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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. **508**

WOODLAND TERRACE, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Petitioner.

J. C. LONG,
W. TURNER LOGAN,
90 Broad Street,
Charleston, S. C.,

LOUIS M. SHIMEL,
122 Church Street,
Charleston, S. C.,

Of Counsel.

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WOODLAND TERRACE, INC., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cause on August 5, 1961.

OPINION BELOW

The opinion of the court below (Appendix A, *infra,* pp. A1-A10) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B, *infra.* p. A11) was entered on August 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, by reason of the representations made by the President of the United States and by the Commissioner of the Federal Housing Administration [hereinafter "FHA"], to the effect that mortgage terms on emergency rental housing projects would be adjusted in the event of the anticipated possibility of subsequently diminished occupancy with consequent decline in earning power, representations that were incorporated into FHA regulations and that according to the district court's findings induced petitioner's sponsors to construct emergency rental housing and to execute the mortgage in question, the United States was precluded from foreclosing on the mortgage that it insured and that had been assigned to it, where the FHA as sole preferred stockholder had complete control of the project.

2. Whether, if the FHA was only required to give consideration to a request for readjustment of the mortgage terms, it is shown on this record to have given fair consideration (as distinguished from brusque, inarticulated rejection) of such a request made by petitioner.

3. Whether, since Section 608 of the National Housing Act, under which the present project was financed, incorporates only Section 207(k) and not Section 207(l) of that Act, the United States when foreclosing a mortgage that the FHA insured under Section 608 and later acquired by assignment is entitled to a deficiency judgment against the defaulting mortgagor.

STATUTES, REGULATIONS, AND DIRECTIVES INVOLVED

Many of the statutes, regulations and FHA directives involved are set forth in the printed Appendix used in the court below (R. 184-194, 215-226, 239), nine additional copies of which have been furnished pursuant to Rule 21(4). Additional regulations are set forth in Appendix C to this petition, *infra*, pp. A12-A15.

STATEMENT

This was an action by the United States, as assignee of an insured mortgage under Section 608 of the National Housing Act (12 U.S.C. §1743; R. 222-226), to foreclose on the housing project owned by petitioner. The execution of the mortgage, the fact of default, and the amount due were admitted, but petitioner by its Sixth Defense (R. 17-20) challenged the Government's right to foreclose, and by its Fourth Defense (R. 15-16) challenged in any event the Government's right to a deficiency judgment.

The case was referred to the District Court's Standing Master (R. 22), who after finding the facts recommended rejection of the defenses and entry of a decree of foreclosure plus a deficiency judgment (R. 22-36). His report was confirmed (R. 55-56), and judgment was entered accordingly (R. 57-60). On appeal, the court below once more rejected petitioner's defenses and affirmed.

Petitioner's Sixth Defense (R. 17-20), in substance, was that the Federal Housing Commissioner, acting in the scope of and in furtherance of his authority, induced the petitioner and its sponsors to construct the housing project in question, representing that, if petitioner did so, and the earning capacity of the project in the future proved inadequate to make the payments called for by the mortgage, due to conditions that both parties contemplated might occur, the Commissioner would cause the terms of the mortgage to be altered or reduced commensurate with such decreased earning capacity. Further, that the project's earning capacity is now inadequate to meet the mortgage requirements, and that petitioner has called upon the Commissioner, who is now the owner of the mortgage, to carry out his representations and directives to effectuate such reduction, not in respect of the principal amount, but only to provide smaller payments over a longer term commensurate with the project's present earning capacity.

The facts relevant to the issues thus framed by the pleadings, which were tried at length below, may be summarized as follows:

A. The Government's basic representations and the implementing regulations.

On December 14, 1946, President Truman made a public statement on the 1947 housing program (Def. Ex. 4, Tr. 23-24,[1] R. 144-145, 170-173). The portions of that statement pertinent here are as follows (R. 170-171, 172, 173):

> "I am determined that a vigorous housing program will continue to be carried out in 1947. • • •
>
> "The main point of emphasis for 1947 is rental housing. Within the total number of homes to be built, it is of major importance that a maximum number of rental units be provided. We are planning financing and other aids that will encourage builders to produce units for rent. • • •
>
> "More family units must be made available for rent to veterans. They should not be compelled to buy in order to get shelter. • • • We also plan a number of financial measures that will encourage the construction of rental housing. • • •
>
> "To provide assurance of continued insured mortgage financing to builders who are planning rental housing, I am making available to the Federal Housing Administration the second billion dollars of Title VI insurance authorization provided for in the Patman Act. This is to be used primarily for rental housing, together with the largest possible share of the first billion dollars directly authorized by Congress. Congress will be asked to advance the termination date of Title VI insured financing authority at least for rental housing, for a period sufficient to accomplish this objective. • • •

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[1] "Tr." refers to those portions of the transcript of testimony before the Master that were not printed in the Appendix, the latter being designated simply as "R." The entire unprinted record is on file with the Clerk.

"To reduce monthly payments and to make possible lower rents, the FHA will extend the term of amortization in its Title VI rental housing commitments beyond the usual 28 years, the amount of extension to be appropriate for the project proposed.

"*To guard against the possibility of lesser earnings of housing projects after the emergency is met, the FHA will work out with concurrence of lending institutions a set of regulations permitting the adjusting of mortgage terms at subsequent periods in the life of the project.*" [Italics added.]

Representations similar to those contained in the last quoted paragraph were made by other officials, as follows:

1. The Federal Housing Commissioner,[2] in a directive sent the Directors of all FHA field offices, dated January 2, 1947 wrote (Def. Ex. 1, Tr. 21-22, R. 134, 135):

"*Adjustment of Section 608 Mortgage Terms*

"So that housing projects constructed under the present emergency conditions may continue to maintain their competitive market position after the housing shortage is met, the Federal Housing Administration will, in collaboration with lending institutions, give consideration to a readjustment of project mortgage terms where it is deemed necessary."

2. This was followed by a similar directive by an Assistant Commissioner on January 7, 1947, also addressed to the Directors of all FHA field offices, directing reproduction and wide circularization of a letter addressed to "Architects, Realtors, Builders, Dealers, Manufacturers and Representatives of Financial Institutions, State of ," on "Rental Housing Program for Veterans" (Def. Ex. 2, Tr. 23, R. 138). Included in the latter circular was this paragraph (R. 141):

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[2] Pursuant to § 1 of the National Housing Act (12 U.S.C. § 1701; R. 216), all of the powers of the Federal Housing Administration are vested in the Federal Housing Commissioner.

"IV. FHA Financing of Rental Projects

1. *Section 608—Rental Housing*

• • • • • • • •

"e. Action has been taken to expedite the handling of requests for *prevailing wage determinations* by the Department of Labor and provisions made for the *adjustment of mortgage terms*, where it is deemed necessary in order that rental projects, constructed under the present emergency, may continue to maintain their competitive market position." [Italics in original.]

Mr. Curt C. Mack, Assistant Commissioner of FHA in Charge of Underwriting from 1940 to 1954 (R. 82-83), testified as to the reason for including the paragraph just quoted (R. 93):

"This addition was put in—in my opinion—to give some reassurance to developers that there would be opportunities for adjusts, for misanalyses, misappropriations, misappraisals of the mortgage • • • because at that time there were extraordinary demands for housing in areas that did not give evidence of likelihood of continuity. • • • I would like to change that likelihood to certainty of continuity. We wouldn't go into any area where there was no likelihood of continuity."

3. On the next day, the same Assistant Commissioner who had dispatched the letter of January 7, *supra*, p. 5, sent a similar circular letter to the Directors of all FHA field offices on the subject, "Meetings with Industry" (Def. Ex. 4, Tr. 23-24, R. 144 et seq.), with which was inclosed a voluminously documented "Suggested Pattern" for "Rental Housing Program for Veterans—Meetings with Industry." This covered advance arrangements and a suggested meeting program, as well as directions for newspaper publicity, invitational letters, charts and literature to be used at all meetings, and suggestions for interviews following the meetings.

Under the heading "Program for Community Meetings," the "Suggested Pattern" stated (R. 148):

> "(5) Stress investment feature as viewed from subsequent annuity."

Former Assistant Commissioner Mack said of that letter (R. 94-95):

> "A. Well, that, in my opinion, was the very crux of the rental housing stimulation program; at that time men who had been producing housing, had been producing limited housing under priority, as Judge Bailey has testified, and the production of rental housing property, which has its principal value in the future productivity of income, annual income called annuity, if you please, had not been in their field. There were a few large builders in the country as they have subsequently emerged during the last ten or so years. Builders were not thinking in terms of building things for future income. They were thinking in terms of building properties to sell, put the profit in their pocket and do it over again, and the effort there was to develop thinking and interest in the production of what was really a different type of realty than that which these people who were expected to be interested to produce it, had been producing."

Further (R. 95):

> "Q. I'm not talking about the bad management feature, but they'd never lose simply because of the lack of demand?
>
> "A. Well, that thinking was there and it expressed, in my language, as I recall it, as an employee and officer of the Administration, it was I am sure agreed among all of us, that every possible feasible and reasonable effort in negotiation and adjustment would be made in order to preserve the interest of the developers."

4. Inclosure No. 12 to the basic "Suggested Pattern for Industry Meetings" was a press release that contained this paragraph (R. 158):

> "In cooperation with lending institutions, FHA will give ready consideration in the future to readjustment of mortgage terms in order to enable projects built under present emergency conditions to maintain their competitive market position; this will involve rewriting mortgages in cases of decreased earnings."

5. In January 1947, the Federal Housing Administration issued a printed brochure headed "Rental Housing Under FHA" (Def. Ex. 5, Tr. 24, R. 174), which contained the following (R. 174, 175):

> "New incentives, speedier action, and increased financial stability are offered builders and sponsors of rental housing projects by recent changes in Federal Housing Administration procedures and policies. • • •
>
> "MORTGAGE REVIEW
>
> "In collaboration with lending institutions, FHA will give consideration to readjustment of mortgage terms if necessary in the future in order to enable projects built under present emergency conditions to maintain their competitive market position and afford protection against decreased earnings."

Former Assistant Commissioner Mack testified that all of these directives sent the Field Directors were considered by the FHA Executive Committee (R. 88) to be binding, that they were binding, and that they were subsequently followed (R. 98).

FHA's Field Operating Manual (Def. Ex. 9, Tr. 58, R. 184), as amended through March 1953 (Tr. 57-58), contained the following provisions concerning mortgage adjustment:

1. There was delegated to the Assistant Commissioner of Rental Housing (R. 85-86, 187-188) the power—

> "11. To approve the modification in the terms of, and authorize the foreclosure of, mortgages assigned to the Federal Housing Commissioner in exchange for debentures under Sections 207 and 608, Titles VII and VIII, and Section 908."

2. There was assigned to one of FHA's functional directors (¶149, R. 189):

> "Assistance to mortgagees and mortgagors in matters involving forebearance [*sic*] with respect to groups of mortgages incident to rehabilitation of projects and in refinancing programs."

3. Also (¶154, R. 191):

> "Formulation of recommendations of the Insuring Office Director with respect to modification of project mortgages, adjustments in rent schedules, changes in charter, substitution of mortgagors, release of portions of security, diversion of replacement reserves, defaults, establishment of receivership, assumption of control of projects and other protective measures and the assignment of mortgages to the Commissioner."

B. Specific representations in present case.

Judge H. E. Bailey, State Director of FHA in South Carolina from 1934 to 1952 (R. 70), on January 9, 1947, acting pursuant to the directions he had received from his Washington superiors (*supra*, p. 5), mailed to "Architects, Realtors, Builders, Dealers, Manufacturers and Representatives of Financial Institutions, State of South Carolina" the Washington-prepared FHA circular letter on "Rental Housing Program for Veterans" that contained the paragraph "e" concerning mortgage adjustments that has already been quoted at p. 6, above (R. 75-76; Def. Ex. 8, Tr. 37-39, R. 179, 182).

A little earlier, in December 1946, Judge Bailey and FHA officials from six other States (Tr. 32) had attended a closed FHA zone meeting in Birmingham, Alabama, that was in substance a school to teach FHA officials how to promote rental housing projects under Section 608 (R. 72-74). At this meeting, a question was asked "what would happen in the event the project became unsuccessful" (R. 73-74), and the answer (R. 74) was that "If the project got in

default due to the lack of tenants, the Government would negotiate it or modify it or assist the sponsors in some way to work the deal out in a satisfactory manner to everybody concerned."

Pursuant to the instructions received from his superiors in FHA, Judge Bailey as State Director caused a meeting to be held at the Columbia Hotel in Columbia, S. C., on January 15, 1947 (R. 76, 81, 99, 103, 108, 112, 124, 127).

The representations made by FHA officials at that meeting were testified to by seven individuals, three of whom were connected with FHA at the time.

Allison, a former FHA official (R. 98), testified that an FHA representative there stated (R. 100) "That in case of trouble due to not sufficient income, that it would be reworked and the terms would make it easier for them to continue the ownership."

Baxter, another former FHA official (R. 103), said that "the statement was made that the Commissioner would hold a preferred share of stock, so that his interest would be that he could, if the project got into trouble, take it over until such time it could be rehabilitated and returned to the former owners."

And Judge Bailey, the State Director, said that at each of his conferences the question came up (R. 78-79), and that (R. 79), "I gave them the same interpretation, that if the mortgage got in default or in difficulty due to the lack of occupancy, the Administration would negotiate either for longer terms, modify it or recast the mortgage in some manner or form satisfactory to the sponsors, to the Commissioner and the others concerned." This interpretation was known to his superiors (R. 80) and was never criticized by them (R. 79, 80).

Outsiders, also, testified to hearing those representations at the January 1947 meeting in Columbia (R. 108, 110-111, 124-125, 127-128). Specifically, Rudolph C. Barnes, Esq.,

a stockholder, officer, and director of, and attorney for, petitioner (R. 112), testified that he had received (R. 113) the letter from the State Director (Def. Ex. 8, R. 179, 182) which stated that provisions had been made for the adjustment of mortgage terms. Mr. Barnes also testified that he attended the Columbia meeting and heard the interpretations and representations as to mortgage adjustments made by the FHA officials (R. 114-115); that he believed the FHA letter and the representations made by the FHA officials at the meeting; and that he acted thereon and advised his clients accordingly. (R. 115-117, 121-123.)

After hearing the testimony, the Master found (R. 24):

> "* * * there is no question in my mind that the President, the Commissioner and the State Directors [*sic*] of the Housing Administration did all the things that the defendant [petitioner here] claims they did to entice the financiers, contractors and others into Federal Housing, and that the promoters of defendant were included among those who were persuaded to come in. The defendant has, however, failed to convince me that there ever existed any other obligation than to give reasonable consideration to a modification of the mortgage terms."

The Master's report was adopted by the District Court (R. 56).

C. Facts relating to present project.

Petitioner was incorporated in South Carolina on April 12, 1949, under a standard FHA form of charter drawn by FHA (R. 118-119; Def. Ex. 16, Tr. 140, R. 120, 205-215).[3] Petitioner was capitalized at $50,100, with 500 shares of common stock of a par value of $100, and one hundred shares of preferred stock, par value $1 per share; all of

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[3] Petitioner's application for mortgage insurance (Def. Ex. 13, Tr. 134-135) had been prepared earlier; it is dated November 18, 1948.

the preferred stock was held by FHA (Def. Ex. 16, "Fifth," at R. 206-208). The number of shares of common stock originally issued was 259 (Tr. 145, 151), based on the value of the land (Tr. 150).[4]

Petitioner furnished FHA with full particulars concerning its project, including the names of its stockholders and the amount of their holdings (Tr. 139; Def. Ex. 15, Tr. 139 [not printed]). Petitioner applied for mortgage insurance (Def. Ex. 13, Tr. 135 [not printed]), and FHA made a commitment for mortgage insurance in the amount of $1,256,100 (Def. Ex. 14, Tr. 138, R. 200-204). On May 5, 1949, petitioner borrowed that amount from the Wachovia Bank & Trust Co. of Winston-Salem, N. C., secured by a note and a mortgage on its property (R. 25-26). The amount of the mortgage was based on the figure determined and fixed by FHA in the construction contract (Tr. 151; Def. Ex. 19, Tr. 164 [not printed]) viz., $1,167,196 (Tr. 163), the excess being applied to stated amounts, also fixed and determined by FHA, for builder's, architect's and attorneys' fees, plus expenses for financing, title, and recording (Tr. 152).

Woodland Terrace itself is a multi-building garden type project in the vicinity of Fort Jackson, Columbia, S. C., and, being opened building by building, was able to earn rentals during the allocated construction period (Tr. 141, 153-154). With the proceeds of the advance rentals that were received before the first monthly payment became due, petitioner purchased 222 shares of its outstanding shares at par, leaving 37 shares of common outstanding (Tr. 154-160). This was before any mortgage amortization was required (Tr. 160), no part of the money paid for these shares came from the proceeds of the mortgage (Tr. 161), that stock is still in petitioner's treasury (Tr. 163), and

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[4] FHA had instructed its field offices to say at community meetings (R. 148), "Remember that every suitable site is the basis of a rental housing project. If you have the site you have a deal."

petitioner filed with FHA annual reports reflecting its purchase (Tr. 156). FHA never questioned the propriety of this purchase (Tr. 203).

For a number of years, the project had virtually no vacancies, and was profitable (Tr. 142). In November 1953, a dividend of $46,250 was paid, leaving $12,000 in the corporate treasury, and in October 1955, two years later, another dividend of $14,800 was paid, leaving $17,000 (Tr. 201-203, 143-144). Each time, in conformity with the terms of petitioner's corporate charter, FHA was similarly paid a dividend on its preferred stock (Tr. 202). FHA was fully informed (Tr. 202-203), and FHA never questioned petitioner's corporate acts (Tr. 203).

During this period, petitioner also paid FHA $45,000 in mortgage insurance premiums (R. 118-119).

About May 1956, however, substantial vacancies occurred, in part because of a reduced complement at Fort Jackson, in part because of competition from the sale of homes with little or no down payments, which "completely broke the apartment rental market" (R. 196-197).

Accordingly, petitioner was unable to meet its April 1, 1957, mortgage payment, and on May 28, 1957, it requested that FHA give it a "work-out arrangement" (Def. Ex. 10, Tr. 118-119, R. 195-197).

On June 13, 1957, the South Carolina office of FHA advised petitioner that "our Washington Office informs us that we cannot make a commitment until the mortgagee has made its election to assign the mortgage or commence action to acquire and tender the property to the Commissioner" (Def. Ex. 11, Tr. 118-119, R. 198). On July 12, 1957, after an intervening assignment, the mortgage was assigned to the Federal Housing Commissioner, who in turn assigned it to the United States (R. 27).

Meanwhile, on June 27, 1957, some two weeks before the mortgage was assigned to FHA (R. 27), petitioner was

notified by FHA's South Carolina office that "we are advised by our Washington office that they have decided to send the case to foreclosure immediately upon assignment" (Def. Ex. 12, Tr. 118-119, R. 199).

The evidence shows that petitioner's attorney conferred with FHA officials in Washington endeavoring to avoid foreclosure (Tr. 165-183, 194-200), but to no avail, even though he offered to pay $125,000 that the stockholders had raised (Tr. 165-168). He was told that the early purchase of treasury stock was a charter violation (Tr. 169), that it was somehow wrong for the stockholders to have made a profit (Tr. 166-167), and that, although FHA had never complained over a 6 or 7 year period of an identity of interest between petitioner's stockholders and the stockholders of the builder of its project (Tr. 172-173), this constituted an improper conflict of interest (Tr. 167-168) under 24 C.F.R. (1959 ed.) §232.25 (Tr. 199-200; *infra*, Appendix C, p. A12), which was adopted some years after the present project was commenced (Tr. 200).[5]

The record shows that FHA made the following representations in respect to profits when the rental housing program was being pushed early in 1947:

1. State Directors' draft letter to architects, realtors, builders, dealers, manufacturers and representations of financial institutions (Def. Ex. 2, R. 138, 139, 141):

> "f. In both large and small communities the attention of equity investors is invited to the attractive investment possibilities in the ownership and management of rental projects."

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[5] 24 CFR § 232.25 first dealt with "Form of contract" when promulgated on August 19, 1954 (19 Fed. Reg. 5256, 5260). It was amended on November 25, 1954 (19 Fed. Reg. 7602, 7604) and again on July 3, 1957 (22 Fed. Reg. 4688). Before 1954, the section numbered § 232.25 dealt with "Title evidence" (1949 ed. of 24 CFR) and with "Certificate of mortgagor regarding racial restrictions" (1950 Cum. Supp. to 24 CFR).

2. Suggested program for community meetings with industry, sent to all State Directors (Def. Ex. 4, at R. 148):

> "(5) Stress investment feature as viewed from subsequent annuity. • • •
>
> "(8) Don't make it tough; make it easy."

3. "Suggested Talk," a part of "Suggested Pattern for Industry Meetings" (Def. Ex. 4 at R. 154-155):

> "In addition to meeting the housing requirements of Veterans, Rental Housing creates steady employment for labor; it affords profitable operations for builders; it provides steady income for sponsors; it gives mortgage lenders sound long-term investments; and it benefits the community as a whole by neighborhood stability. • • •
>
> "Equity investors in rental housing can expect a fair return on their investment during the life of the mortgage and at the end of the amortization period should realize a well-maintained income producing property free and clear of the mortgage debt. • • •
>
> "With an insured mortgage loan up to 90% of necessary current cost, an efficiently operating sponsor-builder may recover through the mortgage substantially all of his cash expenditures. • • •
>
> "As a further incentive to sponsor-builders in establishing initial rentals, FHA authorizes an anticipated net return of 6½% with a 7% vacancy allowance. Under Title VI as such, there is no limit to amount of dividend or rate of return."

D. The present proceeding and the rulings below.

The present action was commenced on January 17, 1958 (R. 25).

A receiver was appointed and is now managing the properties (Appendix A, *infra*, p. A2). The amount due on the mortgage note on May 4, 1959, was $1,191,313.93, re-

flecting a credit of $36,919.37 for cash and bonds in petitioner's reserve for replacements (R. 27-28).[6]

The Master, after finding that FHA had induced petitioner's organizers to embark upon the project, held that FHA was neither a holder in due course nor an innocent purchaser for value (R. 23). However, he went on to hold that the most that the representations amounted to was that FHA was authorized but not required to adjust the mortgage; that its direction not to adjust was not judicially reviewable; and that, in any event, to vary the terms of the mortgage by FHA's obligation to modify would involve a violation of the parol evidence rule (R. 33-35). He therefore recommended a decree of foreclosure (R. 35-36). Despite lengthy objections (R. 36-55), the Master's Report was adopted in its entirety by the district court (R. 55-56), which decreed foreclosure, with provisions for a deficiency judgment (R. 57-60).

The court of appeals affirmed. It held (*infra*, pp. A1-A10) that the interpretations and representations made by the FHA related to its procedural requirements only and that there was no relinquishment of the right to foreclose; that if there were any representations that the FHA would take over defaulting projects for the benefit of stockholders such representations were in conflict with the terms and intent of the statute; and that, despite the failure of Section 608 to incorporate Section 207(l), any assignment of the mortgage to the United States carried with it a right to a deficiency judgment.

REASONS FOR GRANTING THE WRIT

When the United States creates an agency for commercial operations with a "sue and be sued" clause, then, under principles heretofore enunciated by this Court (*Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306

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[6] This was the reserve established for repairs, etc., to offset depreciation (Tr. 145).

U.S. 381; *Federal Housing Administration* v. *Burr*, 309 U.S. 242), that agency is so far stripped of basic sovereign immunities as to be treated like any other business unit. There is no question here of any vestigial disparities of sovereignty, such as freedom from State statutes of limitations (e.g., *United States* v. *Summerlin*, 310 U.S. 414) or the like. Nor is any effort being made here to hold the United States or its officers to "the punctilio of an honor the most sensitive" (Cardozo, Ch. J., in *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546). The question rather is whether in the present proceeding, wherein it is invoking the processes of a court of equity to foreclose a mortgage, the United States must abide the far less exacting standard of "the morals of the market place" (*ibid.*), in a situation where it is neither a holder in due course nor an innocent purchaser for value (R. 23).

The principles brought into question by this petition are not unique to Woodland Terrace, but affect many thousands of mortgages still outstanding. At the end of 1959, the latest year for which information is available,[7] there was outstanding in respect of more than 5000 projects constructed under §608 a mortgage debt of $2,805,796,000, representing 373,477 units of housing, and somewhere over 5000 individual mortgages. FHA, *26th Annual Report for the year ending December 31, 1959*, pp. 17, 37, 51.[8] Moreover, since FHA foreclosures and property acquisitions are now on the rise (*id.*, p. 46), the intrinsic public importance of the questions here presented is actual rather than merely potential.

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[7] FHA's 26th Annual Report, for the year ending December 31, 1959, was not received in this Court's Library until nearly a year later, on December 2, 1960.

[8] The last figure is only approximate, because the Report's figure of 5730 mortgages in force (p. 51) is applicable to Sections 608-610 of the Act without further breakdown.

First. As has been pointed out (*supra*, pp. 4-8, 9-11), the officers of the United States, beginning with the President, represented to those who were being induced to build emergency rental housing for veterans that their mortgages would be adjusted if project earnings decreased, a possibility that was anticipated; FHA's own regulations designated the officers who were to handle mortgage adjustments (*supra*, pp. 8-9); and the Master and the District Court found as a fact that petitioner and its sponsors had been induced by those representations to embark on the project (R. 24, 56).

We pause to point out that the representations here (*supra*, pp. 4-8, 9-11) plainly related to substance; there is not the slightest warrant in the present record for the holding below (*infra*, pp. A5-A6) that they dealt simply with procedural matters. Moreover, Presidential representations are entitled to more weight than mere puffing emanating from overexuberant underlings, see *United States* v. *Murff*, 260 F. 2d 610 (C.A. 2) (President's message regarding Hungarian refugees given effect in deportation proceeding against such a refugee). Nor is it material that two years intervened between the representations and petitioner's start on the project (Appendix A, *infra*, p. A6). The record shows that in South Carolina it was difficult to get the program under way at all (R. 81), and it is a fact that, throughout the entire country, nearly two thirds of the Section 608 program came in 1949 and 1950 (*FHA, 26th Annual Report, supra*, p. 18).

At the very least, as both courts below held (Fdg. 15, R. 33; Appendix A, *infra*, p. A5), "these representations gave assurance of consideration of requests for modification of the terms of mortgages in appropriate cases * * *."

That being so, the FHA was required to give fair consideration to petitioner's request for a "work-out arrangement" (R. 197), an obligation in no sense satisfied by the arbitrary *nyet* made in reply (R. 199). Here, all too plainly, fair consideration was not given; no reasons for

rejecting petitioner's request were set forth in FHA's correspondence,[9] the United States introduced no evidence to support the turn-down, and neither the Master nor the District Court made any findings as to the facts underlying FHA's brusque rejection of petitioner's application for adjustment. Indeed, *non constat* footnote 2 of the opinion below (Appendix A, *infra*, p. A3), on this record the equities strongly favored petitioner:

1. Petitioner had paid FHA $45,000 in mortgage insurance (R. 118-119), and there had been an offer to pay $125,000 additional (Tr. 165-168); the record suggests that this offer may have related to several projects (*id.*), but the court below considered that only petitioner's project was affected (note 2, p. A3, *infra*). The Master made no findings on the point. But if even only a ratable portion of the $125,000 was attributable to petitioner, that portion plus the premiums assuredly outweighed the $61,050 that had been paid out as dividends over the life of the enterprise (Tr. 143-144, 201-203), or even the aggregate of $83,250 representing dividends plus the retirement of 222 shares of common stock (Tr. 157-160).

2. FHA was at all times informed of the above transactions, receiving its own dividends at the time (Tr. 156, 202-203), and never at any time prior to the default questioned any of petitioner's corporate acts (Tr. 203).

3. As the Second Circuit held, affirming the Tax Court (*Commissioner* v. *Gross*, 236 F. 2d 612, affirming 23 T.C. 756), petitioner's retirement of its stock represented a distribution of capital that was taxable as a capital gain rather than as a dividend. Moreover, since the stock was

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[9] The FHA's own Field Operating Manual provided in Sec. 302 that (R. 192) "Letters going out from the Federal Housing Administration represent official messages of the United States Government, and those responsible for the preparation of correspondence should keep this fact in mind."

retired out of current earnings (Tr. 141, 153, 154-160), there was no "windfall" distribution to stockholders from the surplus proceeds of the mortgage (Tr. 161), as was the case in *Loftus* v. *Mason*, 240 F. 2d 428 (C.A. 4), certiorari denied, 353 U.S. 949.

4. When FHA promoted the emergency rental housing program now in question it simply lumped owners and builders together as "sponsor-builders" (Def. Ex. 4 at R. 155; and see *id.* at R. 154, 169, 174). Specifically, the identity of interest between petitioner and its builder was disclosed to FHA at the outset (Tr. 172-173; Def. Ex. 15, Tr. 139; Def. Ex. 19, Tr. 164). On neither score, therefore, could that relationship be retroactively condemned by a §207 regulation adopted five years later, even assuming that this regulation (24 CFR [1959 ed.] §232.25), which was first adopted in August 1954 (see note 5, p. 14, *supra*), could be deemed applicable to §608 projects in any event.[10]

5. Certainly, in view of the inducements on which petitioner relied at the outset (R. 24), inducements that held out glowing prospects of investment possibilities (*supra*, pp. 14-15), it was not open to FHA years later to decry the making of profits (Tr. 166-167). Indeed, without some such profit-making inducements the program could not have been got under way. See Remington, *The Veterans Emergency Housing Program*, 12 Law & Contemp. Prob. 143, 146.

Second. On this record, therefore, it was plainly inequitable for the courts below to decree a foreclosure. There is here no question of affirmative action by a private party seeking to control, by way of judicial review, a matter

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[10] 24 CFR (1949 and 1959 eds.) § 282.19, relating to § 608 projects, specifically provided that while the Commissioner might amend the regulations in that part, "such amendment shall not affect the contract of insurance on any mortgage already insured or any mortgage or prospective mortgage on which the Commissioner has made a commitment to insure."

committed to agency discretion as in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, relied on by the Master (R. 33) and the District Court (R. 56); rather, here the Government's inequitable exercise of its discretion, assuming it had any to exercise, is asserted as a defense to its invocation of the chancellor's assistance in a foreclosure proceeding.

Similarly, we fail to see why or how petitioner's defense calls into question the parol evidence rule. For one thing, the substance of the representations here relied upon was contained in other written instruments (Def. Ex. 1, 2, 4, 5, 8; *supra*, pp. 4-8, 9). For another, the contention that the United States on receiving an assignment of the mortgage is bound by its own prior inducing representations not to enforce that instrument's literal terms no more involves a violation of the parol evidence rule than does the doctrine that a beneficiary who has killed a testator or an insured cannot benefit although duly named in the will or the policy to take upon the latter's death. *New York Mut. Life Ins. Co.* v. *Armstrong*, 117 U.S. 591, 600; *Riggs* v. *Palmer*, 115 N.Y. 506, 22 N.E. 188; Cardozo, *The Nature of the Judicial Process*, 40-43; Ames, *Can a Murderer Acquire Title by His Crime and Keep It?* in *Lectures on Legal History*, 310. In all of these situations, a court of equity prevents the apparent beneficiary from enforcing what is written in the bond.

Third. Since, as this Court has held, FHA by virtue of the "sue and be sued" clause descended from the Olympus of immunity to mingle with mere mortal entities in the marts of commerce (*Federal Housing Administration* v. *Burr*, and *Keifer & Keifer* v. *Reconstruction Finance Corp.*, both *supra*), then, as the preferred stockholder in petitioner, controlling the corporation both by virtue of the latter's charter (¶ Seventh (*e*), R. 210-211) and of its own regulations (24 CFR [1949 ed.] §280.29), FHA was a fiduciary, bound to exercise its broad powers for the benefit

of all of the interested parties. *Pepper* v. *Litton*, 308 U.S. 295. Without laboring the point at this juncture, it was bound at the very least to hold the balance even between the stockholders who had been induced to invest in the project, and FHA itself, which had made the inducements and which had taken over the now delinquent mortgage. It could not, having regard to its fiduciary obligation as the sole preferred stockholder, disregard petitioner's equities, wipe out petitioner's investment, and wind up with a deficiency judgment that, on the basis of prior experience in the same State, might amount to as much as 90% or more (R. 120) of the accelerated principal and interest on a mortgage that on the day before default still had over 25 years to run (R. 26). Whether, as contended below, FHA was bound to take over and operate the project for the stockholders' benefit, need not now be explored at length; but, assuredly, on the present record we submit that this question is not disposed of by merely citing (R. 34; Appendix A, *infra*, p. A6, note 6) *United States* v. *Anderson Apartments, Inc.*, 114 F. Supp. 69 (W.D.S.C.), where there do not appear to have been representations of the character found (R. 24) to have been made here.

Fourth. What adds injury to insult here is that the United States, after inducing investors to enter into the Veterans' Emergency Housing Program by making fulsome representations of profits plus assurances of mortgage readjustment in the event of deficits, has now obtained not merely a decree of foreclosure but also a provision for a deficiency judgment if, as other experiences in the same State indicate, the property when sold on foreclosure may realize "as low as 5¢ and 10¢ and 20¢ on the dollar" (R. 120). Petitioner submits that such a result is justified neither by the law nor by the principles of that equity whose aid the United States is invoking.

By 1942, when §608 of the National Housing Act was first enacted (§11 of the Act of May 26, 1942, c. 319, 56 Stat.

301, 303), Congress was certainly aware of "the economic ills induced by the inflexible payment mortgage" (Wickens, *Adjusting the Mortgagor's Obligation to Economic Cycles*, 5 Law & Contemp. Prob. 617, 621), and must be taken to have had in mind the decisions of this Court sustaining legislation that outlawed deficiency judgments and limited mortgagees on foreclosure to the amount of the debt as evidenced by the fair value of the property. *Richmond Corp.* v. *Wachovia Bank*, 300 U.S. 124; *Honeyman* v. *Jacobs*, 306 U.S. 539; *Gelfert* v. *National City Bank*, 313 U.S. 221. Consequently when, in enacting §608(f), Congress incorporated by reference §207(k), which authorized foreclosure to acquire title to the property, and did not similarly incorporate §207(l), which authorized deficiency judgments, it must be taken to have precluded a grant of the latter power. *Expressio unius exclusio alterius.*

It is true that the legislative history is unilluminating (H.R. Rep. 2039, 77th Cong., 2d sess., pp. 2, 10; S. Rep. 1300, 77th Cong., 2d sess., p. 2), but we think that "this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute," *Greenwood* v. *United States*, 350 U.S. 366, 374. This is particularly so here, where the FHA regulations applicable to §608 projects say nothing of deficiency judgments and contemplate simply acquisition of the property in the event of foreclosure. See 24 CFR (1949 ed.) §§280.10, 280.18, 282.10, 282.12, 282.14, set out in Appendix C, *infra*, pp. A13-A15.

The court below (Appendix A, *infra*, pp. A8-A10) disregarded the regulations, and gave no effect whatever to Congress' deliberate exclusion of §207(l) from the scope of §608.

We think, therefore, that there was no power to provide for a deficiency judgment. But, at the very least, the courts below should have heeded petitioner's "appeal to the chancellor in specific cases to prevent the machinery

of judicial sales from becoming an instrument of oppression" (*Gelfert* v. *National City Bank*, 313 U.S. 221, 232), so that the decree would in any event provide that no deficiency judgment could be had if the fair value of the property was equal to or more than the amount of the mortgage debt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.,
Counsel for the Petitioner.

J. C. LONG,
W. TURNER LOGAN,
90 Broad Street,
Charleston, S. C.,

LOUIS M. SHIMEL,
122 Church Street,
Charleston, S. C.,

Of Counsel.

OCTOBER 1961.

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8244.

UNITED STATES OF AMERICA, *Appellee*,

versus

WOODLAND TERRACE, INC., *Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT CHARLESTON.

GEORGE BELL TIMMERMAN, DISTRICT JUDGE.

(Argued January 23, 1961. Decided August 5, 1961.)

Before SOPER, HAYNSWORTH, and BOREMAN, Circuit Judges.

Louis M. Shimel and J. C. Long (W. Turner Logan on brief) for Appellant, and George E. Lewis, Assistant United States Attorney, (N. Welch Morrisette, Jr., United States Attorney, on brief) for appellee.

HAYNSWORTH, Circuit Judge:

At issue is the right of the United States to foreclose a mortgage on a rental housing project, a mortgage which it had insured through the Federal Housing Administration and later, after the mortgagor's default, acquired by assignment. The Master, to whom the matter was referred, and the District Court found no impediment in the right of foreclosure. We find none.

Woodland Terrace, Inc. was organized in 1949 in South Carolina for the purpose of constructing and operating a rental housing project under § 608 of the National Housing Act.[1] Its charter was in the form approved by FHA. That agency was the owner of an entire issue of preferred stock, having an aggregate par value of $100. The project's individual sponsors acquired 259 shares of common stock having an aggregate par value of $25,900 in exchange for the land near Columbia, S. C., upon which the improvements were to be erected.

Woodland Terrace obtained from Wachovia Bank and Trust Company a loan, insured by FHA, of $1,256,100 payable interest only through October 1950 and thereafter in monthly instalments of principal and interest of $5,757.12 over a period of approximately thirty-three years. The loan was evidenced by a note and secured by a mortgage on forms approved by FHA.

Woodland Terrace then constructed "garden type" apartment buildings on the land it had acquired from the holders of its common stock. It operated and managed the project until a receiver was appointed in these proceedings.

The mortgagor defaulted in the payment of the instalment on the loan due April 1, 1957 and of all subsequently accruing instalments. On May 28, 1957 it wrote to the district office of FHA saying it was unable to meet the April instalment. It explained its financial difficulty by reference to a current vacancy rate of twenty per cent which it attributed to an excess, in past years, of new housing starts over the increase of new families in the area. It expressed the hope that its occupancy rate would improve with continued curtailment in the construction of new houses and continued growth in population. It requested a "work-out arrangement."

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[1] 12 USCA § 1743.

The State Director of FHA responded on June 13, 1957. He reported that he was informed by the Washington Office of FHA that no consideration could be given the request of Woodland Terrace for a work-out arrangement until the mortgagee elected to assign the mortgage or to acquire the property for tender to FHA. He wrote again on June 27, 1957, however, to inform Woodland Terrace that FHA officials had decided to proceed to foreclosure as soon as the mortgage was assigned.[2]

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[2] This correspondence convinces the mortgagor there was no consideration of its request for a work-out arrangement. The request, however, was not without a background. FHA was informed of the financial affairs of Woodland Terrace. The parties were involved in a current controversy over them. FHA was seeking to have restored to Woodland Terrace:

(1) The profit made by a "related" construction company on the construction of the buildings and improvements,

(2) cash disbursed by Woodland Terrace in payment for a majority of its common stock which it had purchased pro rata from its common stockholders. (This transaction occurred before enactment of the special provisions relating to "collapsible corporations." See Burge v. Commissioner, 4 Cir., 253 F.2d 765; Spangler v. Commissioner, 4 Cir., 278 F.2d 665; Bryan v. Commissioner, 4 Cir., 281 F.2d 238; Pomponio v. Commissioner, 4 Cir., 288 F.2d 827. Apparently, these disbursements were not included in the taxable income of the stockholder-recipients), and

(3) cash disbursed as ordinary, but substantial, dividends on the common stock (e.g. $400 per share, though apparently on the reduced number of shares outstanding after the earlier stock redemption).

The stockholders, denying they were obligated to restore anything to Woodland Terrace, had made an offer to pay $125,000 into the corporation on specified conditions. FHA had not accepted this conditional offer.

The merits of this earlier controversy are not before us. Its existence shows, however, that FHA, rightly or wrongly, was dissatisfied with the earlier conduct of the financial affairs of Woodland Terrace and was familiar with it.

The mortgage was assigned to FHA on July 12, 1957. Thereafter, these proceedings to foreclose the mortgage were commenced.

The mortgagor concedes it would have no defense to foreclosure by the mortgagee. The mortgage expressly contemplates foreclosure in the event of default and a deficiency judgment if the mortgaged property brings less than enough to satisfy the debt and costs. It relies upon representations which it construes as a promise by FHA not to exercise its right of foreclosure.

The United States actively promoted the construction of such projects by private business and the use of FHA insured financing. In doing so it promised to be a lenient and understanding creditor, but we agree with the District Court that it did nothing to relinquish its right of foreclosure of a mortgage in default assigned to it if it decided to pursue that course.

In passing the Veterans' Emergency Housing Act of 1946,[3] the Congress found that the combination of the return of veterans of World War II and a long-term housing shortage had created an unprecedented emergency. It called upon executive agencies to exercise their emergency and other powers toward the alleviation of the housing problem.

On December 23, 1946, President Truman announced that a vigorous housing program would be continued into 1947. He emphasized particularly the need of rental housing for returning veterans.

On January 2, 1947, the Commissioner of the Federal Housing Administration wrote to the directors of all FHA field offices, outlining a program for the construction of rental housing for veterans. Among other things, he outlined steps which had been taken to simplify procedures

[3] 60 Stat. 207, § 1(a).

in the approval and financing of § 608 projects. He said action was being taken to expedite the handling of requests for prevailing wage determinations by the Department of Labor.[4] With respect to the adjustment of the terms of mortgages, he said:

> "Adjustment of Section 608 Mortgage Terms
>
> "So that housing projects constructed under the present emergency conditions may continue to maintain their competitive market position after the housing shortage is met, the Federal Housing Administration will, in collaboration with lending institutions, give consideration to a readjustment of project mortgage terms where it is deemed necessary."

Statements of similar import appeared in press releases and other documents. With the one exception noted below, they all clearly stated that in appropriate cases consideration would be given to the adjustment of mortgage terms, and committed the United States to no specific adjustment of the terms of any mortgage.

On January 7, 1947, the Assistant Commissioner sent to the directors of the field offices a circular which the directors disseminated to builders, realtors and others. This circular referred to President Truman's statement, the Commissioner's letter of January 2, 1947, and it listed a number of steps which had been taken to simplify procedures under § 608. In this list, there was the following paragraph:

> "e. Action has been taken to expedite the handling of requests for prevailing wage determinations by the Department of Labor and provisions made for the adjustment of mortgage terms, where it is deemed necessary in order that rental projects, constructed under the present emergency, may continue to maintain their competitive market position."

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[4] Wages of construction workers on such projects were required to be not less than the prevailing wages in the area as determined

This statement was clearly referable to procedures. The record discloses internal provisions for handling requests for the adjustment of mortgage terms in appropriate cases. Announcement of the establishment of such procedures cannot be construed as a general representation that, whenever earnings were adversely affected by low occupancy rates, mortgage terms would be so adjusted as to obviate all defaults. We agree with the District Court that these representations gave assurance of consideration of requests for modification of the terms of mortgages in appropriate cases, but cannot be construed as a relinquishment of the right of foreclosure.

There was also testimony that on January 15, 1947 at an area meeting sponsored by FHA for the information of people interested in considering construction of § 608 projects, representatives of FHA stated that, in the event of a default, FHA would exercise its right as preferred stockholder to take active charge of the management of the corporation and would operate the project, for the benefit of the common stockholders, until the default was remedied. Some of those who, over two years later, became the promoters and stockholders of Woodland Terrace testified they heard and relied upon such statements.

If these statements were made,[5] they do not aid the mortgagor here.

FHA's position as preferred stockholder and the charter provisions giving it the right, in specified circumstances, to replace the Board of Directors and assume active management of the company, were among the many things required by FHA as prerequisites to its insurance of the mortgage. These requirements were imposed for the protection of FHA, not for the benefit of the holders of the common stock of the mortgagor. Doubtless, if FHA exercised the right to assume immediate control of the affairs

[5] The findings below do not resolve the factual question.

of the mortgagor, it would have a fiduciary duty of conservation and avoidance of waste of the stockholders' equity, if there was one. The naked, unexercised power, however, is not inconsistent with the right of foreclosure. Whether FHA could have pursued both remedies at once, it clearly could elect to pursue either.

If, in these circumstances, representatives of FHA made the statements attributed to them, that the right of foreclosure would not be exercised and the right of management would be exercised solely for the possible advantage of the common stockholders and not for the minimization of FHA losses, their statements were in conflict with the purpose and intent of the statute and the regulations. Such unauthorized statements cannot bind the United States or work an estoppel against its exercise of a right clearly defined in the statute and reserved in the mortgage.[6]

These statements and the written representations relating to modification of mortgage terms were made early in 1947. Woodland Terrace was organized on April 12, 1949 and its note and mortgage were dated May 5, 1949. In the intervening two years, nothing resembling the mortgagor's interpretation of the written representations or the oral statements had become embodied in the statute, in FHA's detailed regulations or in its approved mortgage or charter forms. Because of this, the District Court and the Master advanced the alternative ground that resort to the written representations and the oral statements to modify the terms of the integrated agreement were barred by the parol evidence rule. There may be justification for the alternative ground, for FHA, though not a formal party to the mortgage, was the controlling party in fact and through its commitment and insuring agreement it was a formal party to the transaction.

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[6] United States v. Anderson Apartments, Inc., D.C., W.D.S.C., 114 F.Supp. 69.

We need not consider the parol evidence rule, for we think the primary ground is sufficient, that the written representations, properly interpreted, are not inconsistent with foreclosure here and that the oral statements, if made at all, are not binding. These views, however, are buttressed by the fact that in 1949 Woodland Terrace accepted the prescribed charter provisions, subscribed unreservedly to the mortgage and subjected itself unconditionally to the governing regulations of FHA. If its sponsors then thought what they now assert, it would be expected that they would have spoken then of their claim of an inconsistent agreement.

Next, the mortgagor seeks to bring itself within the rule that agency action in violation of its own procedural regulations is invalid. It says the record does not show that local representatives of FHA extended aid or advice to it or made any recommendation as to modification of mortgage terms as required or authorized by its operating manuals. The mortgagor, however, undertook to show no departure from controlling procedural regulations. It contends only that the record does not contain affirmative evidence of procedural regularity.

FHA was not required to offer such evidence. It would be wholly useless to require it in every foreclosure proceeding to affirmatively prove procedural regularity at all levels with respect to every step, when no evidence of irregularity had been offered. The burden of going forward was upon the mortgagor.[7]

Finally, the mortgagor contends that FHA is not entitled to a deficiency judgment. The mortgage provides for such a judgment, if, on foreclosure, the proceeds of sale of the mortgaged property are insufficient to satisfy the debt.

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[7] See United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681; Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280, 75 S. Ct. 746, 99 L.Ed. 1074; Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed. 2d 1403.

Woodland Terrace says, however, that FHA was prohibited from being a mortgagee, being limited to insuring against loss financial institutions which were approved mortgagees. This leads it to the conclusion that FHA, as assignee of an approved mortgagee, may pursue only those remedies provided by the mortgage or by local law which were specifically authorized by Congress.

The conclusion is not required by the premise. The restriction was for the purpose of conserving the funds of FHA. It was to make certain that FHA did not undertake the direct financing of new housing but limited itself to the protection against loss of financial institutions which, with FHA approval, did finance such construction. There is nothing in the restriction or its purpose to suggest that FHA, as assignee, may not exercise remedial rights which the mortgagor expressly conferred upon the mortgagee and its assignees.

It is true that, when Congress enacted § 608[8] it incorporated by reference the provisions of § 207(k)[9] which gives FHA the right to foreclose mortgages which it has acquired by assignment and, pending acquisition of title to the mortgaged property, to exercise all of the rights of a mortgagee. It did not incorporate by reference the provisions of § 207 (l),[10] which, among other things, authorizes FHA "to pursue to final collection by way of compromise or otherwise all claims assigned" to it in connection with transfers to it of insured mortgages or mortgaged property.

However, § 608, itself, specifically contemplates the assignment to FHA "of all claims of the mortgagee against the mortgagor or others arising out of the mortgage

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[8] 12 USCA § 1743(f).

[9] 12 USCA § 1713(k).

[10] 12 USCA § 1713(l).

transaction."[11] If Congress had intended to prohibit FHA enforcement of such claims, it would have been purposeless to authorize their acquisition and to condition the mortgagee's right to the benefit of the insurance upon their assignment. Indeed, prosecution of such claims as an incident of foreclosure would seem to be the exercise of one of the rights of the mortgagee authorized by § 207(k), incorporated by reference in § 608. When, in a foreclosure proceeding, FHA seeks a deficiency judgment, it exercises that right of the mortgagee before, and, therefore, "pending," its acquisition of title to the mortgaged property within the meaning of § 207(k).

We find no error in the judgment of the District Court.

Affirmed.

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[11] 12 USCA § 1743(e).

APPENDIX B

JUDGMENT BELOW

Decree

Filed and Entered August 5, 1961

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8244

UNITED STATES OF AMERICA, *Appellee*,

vs.

WOODLAND TERRACE, INC., *Appellant*.

APPEAL FROM the United States District Court for the Eastern District of South Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

APPENDIX C

Additional FHA Regulations Involved

1. 24 CFR (1959 ed.) § 232.25, first adopted under its present heading in 1954, see note 5, p. 14, *supra*, and applicable according to the notation at the head of Part 232 of Title 24, CFR, to § 207 of the National Housing Act, as amended (12 U.S.C. § 1713), provides as follows:

> "§ 232.25 *Form of contract.* The form of contract between the mortgagor and builder shall be determined in accordance with the following:
>
> "(a) If it is established to the satisfaction of the Commissioner that neither the mortgagor nor any of the officers, directors, or stockholders of the mortgagor have any interest in the builder or contractor, there may be used a lump sum form of contract providing for payment of a specified amount.
>
> "(b) If it is determined by the Commissioner that the mortgagor, its officers, directors or stockholders have any interest, financial or otherwise, in the builder or contractor, the form of contract shall provide for payment of the actual cost of construction, not to exceed an upset price and may provide for payment of a builder's fixed fee in addition thereto. The builder's fixed fee shall not exceed a reasonable allowance therefor as established by the Commissioner, in accordance with customary practices in the area.
>
> "(c) If it is determined by the Commissioner that the mortgagor, its officers, directors or stockholders have any interest, financial or otherwise, in any subcontractor or material supplier, the mortgagor must certify in a form prescribed by the Commissioner prior to final endorsement of the mortgage for insurance that the amounts paid to such subcontractor or material supplier were not more than the rate prevailing in the locality for similar type labor and materials."

2. The following sections of Part 280 of Title 24, CFR (1949 ed.), according to its heading, interpret or apply

§ 608 of the National Housing Act, as amended (12 U.S.C. § 1743; R. 222-226):

"§ 280.10 *Mortgage must be on approved form.* To be eligible for insurance, the mortgage must be executed upon a form approved by the Commissioner for use in the jurisdiction in which the property covered by the mortgage is situated by a mortgagor with the qualifications set forth in §§ 280.23, 280.24, 280.25, 280.26, must be a first lien upon property that conforms with the property standards prescribed by the Commissioner, and the mortgagee must be obligated, as a part of the mortgage transaction, to disburse the entire principal amount of the mortgage to, or for the account of, the mortgagor.

* * * * *

"§ 280.18 *Rights and remedies of mortgagee in event of default or foreclosure.* The mortgage must contain a provision or provisions satisfactory to the Commissioner, giving to the mortgagee, in the event of default or foreclosure of the mortgage, such rights and remedies for the protection and preservation of the property covered by the mortgage and the income therefrom, as are available under the law or custom of the jurisdiction."

3. The following sections of Part 282 of Title 24, CFR (1949 ed.), according to its heading, interpret or apply § 608 of the National Housing Act, as amended (12 U.S.C. § 1743; R. 222-226):

"§ 282.10 *Computation of benefits received by conveyance.* If the mortgagee elects to proceed under, and does proceed under and in accordance with, the provisions of § 282.8 (b) and at any time within thirty (30) days (or such further time as may be allowed by the Commissioner in writing) after acquiring title to and possession of the mortgaged property in accordance with such section, tenders to the Commissioner possession thereof and a deed thereto containing a covenant which warrants against acts of the mortgagee and of all parties claiming by, through, or under the mortgagee, conveying title to such property satisfac-

tory to the Commission, as provided in § 282.11, and assigns (without recourse or warranty) any and all claims which it has acquired in connection with the mortgage transaction and as a result of the foreclosure proceedings or other means by which it acquired such property, including but not limited to any claims on account of title insurance and fire or other hazard insurance, except such claims as may have been released with the prior approval of the Commissioner, the Commissioner shall promptly accept conveyance to such property and such assignments, notwithstanding that the buildings or improvements thereon shall be incomplete or may have been destroyed, damaged, or injured in whole or in part, and shall deliver to the mortgagee debentures and Certificate of Claim as provided in § 282.9, except that the one percent (1%) deduction set out in paragraph (a) (3) (i) thereof with respect to the amount of debentures shall not apply.

• • • • •

"§ 282.12 *Evidence of title.* The mortgagee, at the time a deed is tendered in accordance with § 282.10, shall furnish to the Commissioner without expense to him satisfactory evidence of such title. Such title evidence shall be executed as of a date to include the recordation of the deed to the Commissioner and, shall be in the form of an owner's policy of title insurance, or a satisfactory abstract and attorney's opinion covering the period subsequent to the recording of the mortgage, or a satisfactory continuation of the title evidence accepted by the Commissioner at the time the mortgage was insured, depending upon the form of title evidence originally accepted by the Commissioner.

• • • • •

§ 282.14 *Mortgage default or prepayment.* If after the mortgage becomes in default, as provided in § 282.8, the mortgagee does not make the assignment provided in § 282.8 (a), or does not foreclose or otherwise acquire the mortgaged property and make the conveyance provided in § 282.10, and written notice thereof is given to the Commissioner; or in the event that the mortgagor pays the obligation under the mortgage in full prior to the maturity thereof and the mortgagee pays

the adjusted premium charge required under the provisions of § 282.4 of the regulations in this part and written notice thereof is given to the Commissioner, the obligation to pay the annual premium charge shall cease, and all rights of the mortgagee and the mortgagor under §§ 282.9 and 282.10 shall terminate as of the date of such notice."

Supreme Court, U.S.
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No. 408

In the Supreme Court of the United States

October Term, 1961

[redacted]

Petitioners,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

[redacted]

[redacted]

[redacted]

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619439—61

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 508

WOODLAND TERRACE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The report of the Standing Master (R. 22–36) and the order of the district court confirming the master's report (R. 55–60) are unreported. The opinion of the Court of Appeals for the Fourth Circuit (Pet. App. 1–10) is reported at 293 F. 2d 505.

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1961. The petition for a writ of certiorari was filed on October 19, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Housing Administration (F.H.A.) was entitled to foreclose its mortgage on petitioner's rental housing project because of the mortgagor's default.

2. Whether, in the event of a foreclosure, F.H.A. is precluded by law from securing a deficiency judgment against the mortgagor.

STATUTES INVOLVED

The pertinent provisions of the National Housing Act are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

Petitioner, Woodland Terrace, Inc., was organized in 1949 for the purpose of constructing, operating and managing a rental housing project under Section 608 of the National Housing Act of 1947, 12 U.S.C. 1743. On May 5, 1949, petitioner obtained from the Wachovia Bank and Trust Company an F.H.A. insured loan of $1,256,100 payable in monthly installments of principal and interest over a period of approximately thirty-three years. The loan was evidenced by a note and secured by a mortgage which expressly provided for foreclosure in the event of default and for a deficiency judgment if the mortgaged property were sold for less than the debt due (R. 1–4, 5–14).

Subsequently, petitioner constructed, operated, and managed the housing project. Petitioner defaulted in the payment of the installment due April 1, 1957, and all subsequently accruing installments. On May 28, 1957, petitioner wrote to the district office of the

F.H.A. requesting a "work-out arrangement," explaining that its financial difficulty was due to a twenty per cent vacancy rate (R. 195–97). On June 13, 1957, the State Director of the F.H.A. informed petitioner that no consideration could be given the request until the mortgagee elected to assign the mortgage or to acquire the property for tender to F.H.A. (R. 198). On June 27, 1957, the State Director informed petitioner that F.H.A. officials in Washington, D.C., had decided to foreclose as soon as the mortgage was assigned (R. 199). On July 12, 1957, the mortgage was assigned to F.H.A. and, on January 17, 1958, foreclosure proceedings were commenced. The execution of the mortgage, the fact of default, and the amount due were admitted (Pet. 3), but petitioner, as here, challenged the right of the government to foreclose (R. 17–20) and secure a deficiency judgment (R. 15–16). In this connection, petitioner relied upon various general directives and statements by F.H.A. officials.[1] It insisted that these directives and statements constituted an enforceable promise by F.H.A. that it would not foreclose a mortgage on a Section 608 project if the default resulted from a decrease in occupancy.

The case was referred to the district court's Standing Master who rejected petitioner's defenses and recommended the entry of a decree of foreclosure and a deficiency judgment (R. 22–36). Over petitioner's objections (R. 36–55), the district court confirmed

[1] The directives and statements are set forth in the petition at pp. 4–11.

the report and entered judgment accordingly (R. 55–60). The Court of Appeals for the Fourth Circuit affirmed, 293 F. 2d 505 (Pet. App. 1–10). It held that the F.H.A. had not promised to relinquish the right to foreclose but merely had indicated a willingness, as a procedural matter, to consider a request for a "work-out arrangement." In the court's view, petitioner had not established any procedural irregularity in this regard. The court went on to hold that Congress had authorized the F.H.A. to obtain a deficiency judgment.

ARGUMENT

Petitioner seeks review in this Court of the holding below that the Federal Housing Administration properly exercised its right to foreclose petitioner's mortgage and to assess a deficiency judgment. That holding is clearly correct. Moreover, it does not conflict with the decisions of this Court or any other court. Nor is the question of sufficient importance, in itself, to warrant this Court's review.[2]

1. As petitioner implicitly concedes, the mortgagee could have foreclosed the mortgage on petitioner's project. In terms, the mortgage provides for foreclosure by the mortgagee in the event of a default and for a deficiency judgment if the sale of the mortgaged property brings less than enough to satisfy the debt and costs (R. 5–14). Petitioner claims, however, that foreclosure by F.H.A. is precluded

[2] Officials of the Federal Housing Administration have advised us that more than 5,500 similar mortgages were insured by F.H.A. on October 31, 1961. Of that number, seventy mortgages were in the process of foreclosure.

by a wide variety of directives and statements by various F.H.A. officials (Pet. 4–11). Petitioner insists that they must be construed as substantive guarantees by which F.H.A. relinquished the right to foreclose petitioner's mortgage (Pet. 18).

This suggested reading is plainly without merit. Nowhere did F.H.A. represent, either expressly or impliedly, that it had relinquished its right to foreclose defaulted mortgages if it deemed such action necessary to safeguard its interests. A reading of the statements referred to in the petition (Pet. 5, 7, 8) indicates clearly that all that was stated was that *consideration* would be given to a readjustment of a project mortgage in the event of financial difficulty. Indeed, it would have been entirely unreasonable for any borrower to have supposed that F.H.A. would have waived its rights in the manner urged by petitioner. As petitioner itself notes, the Administration has insured billions of dollars of mortgage debts, largely in reliance upon its primary remedy of foreclosure.[3]

2. Petitioner next contends (Pet. 18–20) that proper consideration was not given to its request for a "work-out arrangement." It stresses that no reasons were given for the rejection and that no evidence was introduced by F.H.A. in the district court

[3] While the court below did not need to reach the point, the district court held alternatively that the parole evidence rule would bar any consideration of the F.H.A. statements. If certiorari is granted, the government may urge this point as an additional ground for affirmance.

to support its decision to foreclose. However, as the court of appeals correctly held, "F.H.A. was not required to offer such evidence. It would be wholly useless to require it in every foreclosure proceeding to affirmatively prove procedural regularity at all levels with respect to every step, when no evidence of irregularity had been offered. The burden of going forward was upon the mortgagor." 293 F. 2d at 509 (Pet. App. 8). Cf. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260; *Shaughnessy* v. *United States ex rel. Accardi,* 349 U.S. 280; *Service* v. *Dulles,* 354 U.S. 363.

3. Petitioner also challenges the fairness of the determination to foreclose, arguing "that the equities strongly favored petitioner" (Pet. 19). Plainly, however, the decision as to whether to exercise its legal right to foreclose upon default is that of the mortgagee alone. Moreover, the record discloses that the determination to foreclose was not made arbitrarily, but rather was based upon F.H.A.'s close scrutiny of the conduct of petitioner's operations and its dissatisfaction with certain aspects of it.[4]

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[4] The court below noted (Pet. App. 3) (293 F. 2d 507, fn. 2):

"FHA was informed of the financial affairs of Woodland Terrace. The parties were involved in a current controversy over them. FHA was seeking to have restored to Woodland Terrace:

"(1) The profit made by a 'related' construction company on the construction of the buildings and improvements,

"(2) cash disbursed by Woodland Terrace in payment for a majority of its common stock which it had purchased pro rata from its common stockholders. (This transaction occurred before enactment of the special provisions relating to 'collapsible corporations.' See *Burge* v. *Commissioner,* 4 Cir., 253 F.

There is no greater substance to petitioner's contention that principles of equity and fairness demand that the F.H.A., as a preferred shareholder of the corporation, is "bound to take over and operate the project for the shareholders' benefit" (Pet. 22). While F.H.A. may have reserved the right to do so as additional security for its guarantee, it was clearly under no duty to forego its primary protection, the right to foreclose upon the mortgage.

4. Finally, petitioner challenges the right of the F.H.A. to a deficiency judgment. Although the mortgage executed by petitioner expressly provides for such a deficiency judgment, the governing statute, 12 U.S.C. 1743, *infra*, pp. 10–11, does not expressly so provide, and petitioner argues that F.H.A. is limited to the remedies specifically authorized by Congress. There is no indication, however, that Congress intended by its silence to relinquish such an important right, which F.H.A. as assignee of the mortgage would otherwise have.

2d 765; *Spangler* v. *Commissioner*, 4 Cir., 278 F. 2d 665; *Bryan* v. *Commissioner*, 4 Cir., 281 F. 2d 238; *Pomponio* v. *Commissioner*, 4 Cir., 288 F. 2d 827. Apparently, these disbursements were not included in the taxable income of the stockholder-recipients), and

"(3) cash disbursed as ordinary, but substantial, dividends on the common stock (e.g. $400 per share, though apparently on the reduced number of shares outstanding after the earlier stock redemption).

"The stockholders, denying they were obligated to restore anything to Woodland Terrace, had made an offer to pay $125,000 into the corporation on specified conditions. FHA had not accepted this conditional offer.

"The merits of this earlier controversy are not before us. Its existence shows, however, that FHA, rightly or wrongly, was dissatisfied with the earlier conduct of the financial affairs of Woodland Terrace and was familiar with it."

Indeed, the contrary inference is required. The entire statutory scheme evidences an intent to put F.H.A. in the stead of the mortgagees. Section 608 of the National Housing Act, 12 U.S.C. 1743, specifically contemplates the assignment to F.H.A. of "all rights and interests arising under the mortgage so in default [and] all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction."[5] Section 608(f) of the National Housing Act, 12 U.S.C. 1743(f), also incorporates by reference the provisions of Section 207(k) of the Act, 12 U.S.C. 1713(k), which gives F.H.A. the right to foreclose mortgages which it has acquired by assignment and, pending acquisition of the title to the mortgaged property, to exercise all of the rights of a mortgagee.[6] The import of this broad authority to the F.H.A. is obviously to give it all of the rights and claims of the mortgagee, including the specifically enumerated rights contained in the mortgage. Indeed, if Congress had intended to prohibit F.H.A. enforcement of such claims, it would have been purposeless to authorize their acquisition and to condition the mortgagee's right to the benefit of the insurance upon their assignment. At the very least, prosecution of such claims as are incident to foreclosure represents an exercise of one of the rights

[5] 12 U.S.C. 1743(c) (1) and (2), quoted *infra*, p. 10.

[6] As the court of appeals held, "When in a foreclosure proceeding, FHA seeks a deficiency judgment, it exercises that right of the mortgagee before, and, therefore, 'pending,' its acquisition of title to the mortgaged property within the meaning of § 207(k)." 293 F. 2d at 510; Pet. App. 10.

of the mortgagee authorized by Section 207(k), 12 U.S.C. 1713(k).[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ALAN S. ROSENTHAL,
TERENCE N. DOYLE,
Attorneys.

NOVEMBER 1961.

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[7] Petitioner places great stress on the fact that Congress failed to incorporate Section 207(l), 12 U.S.C. 1713(l), in Section 608 (Pet. 23). Contrary to petitioner's suggestion (Pet. 23), Section 207(l) does not expressly provide for a deficiency judgment and, hence, the failure to incorporate that section does not fairly yield petitioner's inference that this omission was a deliberate refusal to grant F.H.A. the authority to assess a deficiency judgment.

APPENDIX

The National Housing Act, as amended, 12 U.S.C. 1701, *et seq.*, provides in pertinent part:

Section 608 [12 U.S.C. 1743].

* * * * *

(c) The failure of the mortgagor to make any payment due under or provided to be paid by the terms of a mortgage insured under this section shall be considered a default under such mortgage, and if such default continues for a period of thirty days, the mortgagee shall be entitled to receive the benefits of the insurance as hereinafter provided, upon assignment, transfer, and delivery to the Commissioner, within a period and in accordance with rules and regulations to be prescribed by the Commissioner of (1) all rights and interest arising under the mortgage so in default; (2) all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction; (3) all policies of title or other insurance or surety bonds or other guaranties and any and all claims thereunder; (4) any balance of the mortgage loan not advanced to the mortgagor; (5) any cash or property held by the mortgagee, or to which it is entitled, as deposits made for the account of the mortgagor and which have not been applied in reduction of the principal of the mortgage indebtedness; and (6) all records, documents, books, papers, and accounts relating to the mortgage transaction. * * * *Provided,* That the mortgagee in the event of a default under the mortgage may, at its option and in accordance with regulations of, and in a period to be determined by the Commissioner,

proceed to foreclose on and obtain possession of or otherwise acquire such property from the mortgagor after default, and receive the benefits of the insurance as herein provided, upon (1) the prompt conveyance to the Commissioner of title to the property which meets the requirements of the rules and regulations of the Commissioner in force at the time the mortgage was insured, and which is evidenced in the manner prescribed by such rules and regulations; and (2) the assignment to him of all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction or foreclosure proceedings, except such claims that may have been released with the consent of the Commissioner. Upon such conveyance and assignment, the obligation of the mortgagee to pay the premium charges for insurance shall cease and the mortgagee shall be entitled to receive the benefits of the insurance as provided in this subsection, except that in such event the 1 per centum deduction, set out in (i) hereof, shall not apply.

* * * * *

(f) The provisions of section 1713(k) of this title shall be applicable to mortgages insured under this section, except that as applied to such mortgages (1) all references in such section 1713(k) to the "Housing Fund" shall be construed to refer to the "War Housing Insurance Fund", and (2) the reference therein to "subsection (g)" shall be construed to refer to "subsection (c)" of this section.

* * * * *

Section 207(k) [12 U.S.C. 1713(k)].

(k) *Acquisition of property by conveyance or foreclosure.*

The Commissioner is authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this sec-

tion and assigned to him by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion. The Commissioner shall so acquire possession of and title to the property by voluntary conveyance or institute foreclosure proceedings as provided in this section within a period of one year from the date on which any such mortgage becomes in default under its terms or under the regulations prescribed by the Commissioner. * * * Pending such acquisition by voluntary conveyance or by foreclosure, the Commissioner is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as may be necessary to preserve or protect the lien of such mortgage.

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